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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TROFIMENA BONITO,

Cross-Complainant and Respondent,

v.

HUNTINGTON CONDOMINIUM  
ASSOCIATION,

Cross-Defendant and Appellant.

G049338

(Super. Ct. No. 30-2011-00492703)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed in part, reversed in part, and remanded with instructions.

Perry Law Firm, Michael R. Perry, Larry M. Roberts, Michelle A. Hoskinson; Bohm Wildish and Daniel R. Wildish for Cross-Defendant and Appellant.

No appearance for Respondent.

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Cross-defendant and appellant Huntington Condominium Association (Association) appeals from a judgment the trial court entered against the Association on cross-complainant and respondent Trofimen Bonito's (Bonito) breach of fiduciary duty and negligence claims. Bonito sued the Association to recover for damage to her home caused by the Association's failure to remediate elevated groundwater levels despite obtaining funds for that purpose through an earlier construction defect lawsuit against the developer.

The Association asserts several challenges to the trial court's judgment, but we conclude it forfeited all of them except one. Because we presume the trial court's judgment is correct, the Association bears the burden to affirmatively show the court erred. To meet this burden, the Association must cite and explain why the governing legal authorities and evidence in the record demonstrate the trial court committed prejudicial error. A party may forfeit its appellate claims if it fails to follow these standard rules. As explained below, the Association forfeited its challenges to the judgment because it offers little more than the bare assertion the trial court erred, failing to even address the express basis the court provided for its rulings in its statement of decision.

The sole issue not forfeited is the Association's challenge to the amount of damages. The court awarded Bonito \$1,200 in damages, but the statement of decision fails to provide any factual or legal basis for the award. Indeed, the court's statement of decision is completely silent on the issue of damages despite the Association's specific request to include that issue in the decision, and its objection when the proposed statement of decision failed to address the issue. As explained below, the trial court's failure to provide properly requested findings on a material issue such as damages is reversible error.

Accordingly, we reverse the trial court's judgment and remand solely for the trial court to prepare a new statement of decision providing the factual and legal basis

for the amount of damages it awarded. We affirm the court's judgment in all other respects.

## I

### FACTS AND PROCEDURAL HISTORY

An appellant's opening brief must include a summary of the significant facts limited to matters in the record and a summary of the relevant procedural history. (Cal. Rules of Court, rule 8.204(a)(2); *Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 558 (*Kleveland*).) The summary of facts must include all operative facts affecting the issues on appeal, not merely the facts favorable to the appellant. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113-114 (*Lewis*).) The Association's opening brief falls far short of meeting these burdens.

Although the Association's brief includes a short section entitled "Factual Background," it provides few of the facts necessary to understand the Association's challenges to the trial court's judgment, the factual context in which Bonito's claims arose, or the procedural history of this case. For example, the trial court issued a statement of decision that includes numerous factual findings to support its judgment, but the Association's brief fails to acknowledge the court even issued a statement of decision and it ignores the court's comprehensive factual findings. The factual summary we provide is based largely on the trial court's statement of decision.<sup>1</sup>

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<sup>1</sup> Our effort to summarize the relevant facts is made more difficult by the Association's failure to provide an adequate record on appeal. For example, the record includes neither the parties' pleadings nor the exhibits they offered at trial. Although all exhibits are "deemed" part of the record on appeal, they are not included in the clerk's transcript or transmitted to the appellate court unless they are specified by number in the designation of the appellate record or one of the parties makes a timely request to transmit the exhibits. (Cal. Rules of Court, rules 8.122(a)(3), 8.224.)

In 1999, Bonito purchased a house in the development the Association operates in Orange, California. She lived in another state at the time, and purchased the home as an investment and a place to live when she retired. In the interim, her adult son moved into the home and she executed a power of attorney authorizing him to handle all matters relating to the residence.

From the outset, Bonito's son noticed high groundwater levels in the development's common areas, particularly in those areas with the lowest elevation. For example, in low-lying areas in the development, groundwater would bubble up through cracks and expansion joints in the sidewalks, curbs, and streets and fill cleanouts and below grade valve boxes with standing water. Bonito's home was located in the development's lowest area and the grass around it was constantly wet and muddy with moss and algae. Bonito's son, however, did not notice any groundwater intrusion into the home.

The same year Bonito bought the home, the Association filed a construction defect lawsuit against the community's developer. The defects the Association alleged included excessive groundwater related to the final grade level of the development. In 2003, the Association settled that lawsuit for \$6.3 million, and \$500,000 of the settlement proceeds were set aside to remediate the groundwater issues. After the settlement, Bonito's son repeatedly asked the Association's board of directors how it would use the money to remediate the groundwater problems, but nothing was done while the board allocated funds to address other issues in the development. Friction began to develop between Bonito's son and the Association's board based on his repeated requests and the board's inaction. In June 2008, Bonito's son complained to the Association's board about water intrusion inside his garage, and he stopped paying monthly Association dues based on its failure to address the problem.

In July 2008, the Association's board hired a geological engineering firm to study the groundwater problems in the development. The firm conducted several studies

and made several recommendations to the Association's board. To test the effectiveness of one recommendation, the firm installed approximately 100 feet of French drains under an intersection. This alleviated the high groundwater in the area, but only within a few feet of the drains. In its final report, the firm recommended installing French drains near the homes in the most problematic areas of the development, including Bonito's residence. The Association's board, however, took no action on this recommendation because the firm could not identify the source of the high groundwater, and therefore could not assure the Association the French drains would fix the problem permanently.

Frustrated with the firm's inability to develop a definite remediation plan and the firm's mounting bills, the Association's board hired a second geological engineering firm. The new firm did not see any problems with the groundwater when it first examined the property and concluded "the groundwater issue had been alleviated by the homeowners being more conscious of their irrigation water usage." During this period, the Association did nothing to address the water issue at Bonito's home, but it conducted a study of the individual homeowners' water usage, which showed Bonito's home used far more than the average homeowner in the development. Bonito's son attributed this to a faucet inadvertently left on while he was on vacation, and he continued to demand action on the groundwater problem, including installing French drains at Bonito's home. The Association did nothing and the groundwater problem remained unabated at the time of trial.

In July 2011, the Association filed the underlying action against Bonito to collect unpaid association dues. In October 2011, Bonito cross-complained against the Association. The operative second amended cross-complaint included claims for breach of contract based on the covenants, conditions, and restrictions for the development (CC&R's), breach of fiduciary duty, and negligence. In August 2013, while this action was pending, floor tiles in Bonito's home began popping up and revealed a narrow crack in the slab and a thin film of water under the tile. After inspecting the property, the

Association's geological engineering firm opined the groundwater was not percolating through the slab, but offered no opinion on the source of the water in Bonito's home.

The record does not reveal how the Association's complaint against Bonito was resolved, but a bench trial on Bonito's cross-complaint against the Association began in October 2013 and concluded in November 2013. After trial, the court announced its tentative decision to enter judgment for the Association on Bonito's breach of contract claim, but for Bonito in the amount of \$1,200 on the breach of fiduciary duty and negligence claims. The Association timely asked for a statement of decision on numerous issues. The trial court instructed Bonito to prepare a proposed statement of decision. After receiving Bonito's proposed statement of decision and the Association's objections, the trial court issued its own statement of decision in December 2013. The court's statement contained several pages of factual and legal findings to support its decision in Bonito's favor on her breach of fiduciary duty and negligence claims and the Association's affirmative defenses based on the statute of limitations, laches, and the deference owed to homeowner association board decisions on maintenance issues. The court later entered judgment for Bonito and the Association timely appealed.<sup>2</sup>

## II

### DISCUSSION

#### A. *Standard of Review and Appellant's Burden on Appeal*

The cardinal rule of appellate review is that the trial court's judgment is presumed correct, and therefore the appellant has the burden to affirmatively establish

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<sup>2</sup> The Association mistakenly claims the court entered judgment against it in the amount of \$2,400. The court entered judgment for Bonito and against the Association in the amount of \$1,200 on the breach of fiduciary duty claim, and \$1,200 on the negligence claim. It appears the trial court awarded the same damages on the two causes of action, resulting in an award of only \$1,200. A judgment for \$2,400 would result in an improper double recovery.

prejudicial error. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 (*Foust*); *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*).) ““In the absence of a contrary showing in the record, all presumptions in favor of the trial court’s action will be made by the appellate court. “[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.”” [Citation.]” (*Foust*, at p. 187.) “We presume the trial court followed the applicable law.” (*Cahill*, at p. 956.)

“An appellant ‘must convince the court, by stating the law and calling relevant portions of the record to the court’s attention, that the trial court decision contained reversible error.’ [Citations.]” (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 869 (*Lafayette*).) The appellant may not selectively provide the appellate court with only facts favorable to its position, but rather must summarize all operative facts that affect the resolution of the issues on appeal. (*Kleveland, supra*, 215 Cal.App.4th at pp. 557-558; *Lewis, supra*, 93 Cal.App.4th at pp. 113-114.) This burden includes the “affirmative obligation to provide an adequate record so that we may assess whether the trial court [erred].” (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447; *Foust, supra*, 198 Cal.App.4th at p. 187.) ““Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].’ [Citation.]” (*Foust*, at p. 187; see *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.)

““Appellate briefs must provide argument and legal authority for the positions taken. “When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.”” [Citation.] ‘We are not bound to develop appellants’ argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.’ [Citations.]” (*Cahill, supra*, 194 Cal.App.4th at p. 956; see *Niko*

*v. Foreman* (2006) 144 Cal.App.4th 344, 368 (*Niko*).) Accordingly, the appellant must provide argument and authority as to why the trial court’s specific ruling was wrong, and the failure to do so forfeits any challenge to that ruling. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074 (*Salas*).)

B. *The Association Forfeited Most of the Issues Raised in Its Appeal*

The Association challenges the trial court’s decision on the breach of fiduciary duty and negligence claims on a variety of grounds. With only one exception, however, the Association forfeited its challenges by failing to address the trial court’s reasoning as set forth in its statement of decision or to provide an adequate record so we may determine whether the Association’s claims have merit.

First, the Association contends the trial court erred in deciding the breach of fiduciary duty claim in Bonito’s favor because the court failed to apply the rule of judicial deference that applies to decisions by a homeowners association. “‘Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development’s common areas, courts should defer to the board’s authority and presumed expertise.’ [Citation.]” (*Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 939 (*Affan*).) This rule of deference, however, applies only in limited circumstances and does not create blanket immunity for all decisions and actions by a homeowners association. (*Id.* at pp. 939-940.) In *Affan*, we concluded the trial court erred in applying the rule where a homeowner association repeatedly studied a plumbing problem that caused sewage to backup in the plaintiffs’ unit, but did nothing over a 10-year period to fix it. (*Id.* at pp. 941-944.)



Here, the trial court's statement of decision cited *Affan* and explained the court would not apply the rule of deference because the Association knew about the groundwater problem, brought a construction defect lawsuit based on the problem, settled that lawsuit for a substantial sum of money, and did nothing to correct the problem other than study it for more than 10 years. In arguing the trial court erred by refusing to apply the rule of deference, the Association does not cite *Affan* or address the trial court's findings that the Association's inaction rendered this affirmative defense inapplicable. Instead, the Association merely offers the bare conclusion its board acted reasonably and in good faith. By failing to address the trial court's express findings and controlling authority on this issue the Association forfeited its challenge. (See *Salas, supra*, 198 Cal.App.4th at p. 1074; *Cahill, supra*, 194 Cal.App.4th at p. 956; *Niko, supra*, 144 Cal.App.4th at p. 368.)

Next, the Association argues the trial court erred in deciding the breach of fiduciary duty and negligence claims in Bonito's favor because both claims are barred by the statute of limitations and the doctrine of laches. In its statement of decision, the trial court rejected these affirmative defenses because it found the groundwater problems at issue constituted a continuing nuisance and Bonito did not discover the groundwater intrusion into the living area of her home until after filing this action. The Association fails to address the trial court's findings, and instead merely argues Bonito's son began complaining about the groundwater issues around 2003 or 2004 and therefore Bonito's action was time-barred when she filed it in 2011. The Association waived the issue by failing to address the express basis for the court's ruling. (See *Salas, supra*, 198 Cal.App.4th at p. 1074; *Cahill, supra*, 194 Cal.App.4th at p. 956; *Niko, supra*, 144 Cal.App.4th at p. 368.)

The Association also contends the trial court erred because there is no evidence showing the Association's failure to repair the common areas caused Bonito damage. This bare, unsupported conclusion falls far short of satisfying the Association's

burden to cite the controlling law and call our attention to the relevant portions of the record establishing error. (See *Lafayette*, *supra*, 37 Cal.App.4th at p. 869.) Indeed, the Association fails to even state—let alone cite any legal authority discussing—the standard for causation on Bonito’s claims. Moreover, the Association provides no explanation how the trial court’s findings on the long-term existence of the groundwater problem in the development, the location of Bonito’s home in the lowest part of the development where the groundwater problem is most severe, and the crack in Bonito’s slab with a film of water displacing her floor tiles does not support a finding of causation. By offering nothing more than an unsupported assertion that the trial court erred, the Association forfeited this issue. (See *Salas*, *supra*, 198 Cal.App.4th at p. 1074 [appellant waives challenge by failing to support it with reasoned argument and authority]; *Niko*, *supra*, 144 Cal.App.4th at p. 368 [“One cannot simply say the court erred, and leave it up to the appellate court to figure out why”].)

Finally, the Association contends the trial court erred by ruling in Bonito’s favor on the negligence claim because an exculpatory clause in the Association’s CC&R’s limited its liability to gross negligence only, and Bonito failed to show the Association was grossly negligent. The Association forfeited this challenge because it failed to include the Association’s CC&R’s as part of the appellate record and did not transmit the trial exhibit to this court. The Association’s brief includes a cite to the clerk’s transcript where the relevant provision of the CC&R’s is allegedly set forth, but the cited page is an attorney service transmittal slip that has nothing to do with the Association’s CC&R’s. Without a copy of the CC&R’s, we cannot determine whether or how they limit the Association’s liability. (See *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 657 [appellate court cannot determine if trial court erred in refusing to admit exhibits that appellant failed to transmit to appellate court]; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291 [“Where exhibits are missing we will not presume they would undermine the judgment”].)

C. *The Trial Court Committed Reversible Error By Failing to Address Damages in Its Statement of Decision*

The Association contends the trial court erred by awarding Bonito damages on her breach of fiduciary duty and negligence claims because Bonito offered no evidence on the cost of repair or diminution in value. We cannot reach the merits of this claim because the court's statement of decision failed to address damages despite the Association's timely request. We therefore reverse and remand for the trial court to issue a new statement of decision explaining the basis for its damage award.

Upon any party's timely request in a nonjury trial, the trial court must "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) The principal controverted issues are those which are "relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case." (*Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 565.)

A court's statement of decision "need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. [Citations.] '[A] trial court rendering a statement of decision under . . . [Code of Civil Procedure] section 632 is required to state only ultimate rather than evidentiary facts because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them. [Citation.]' [Citations.] In other words, a trial court rendering a statement of decision is required only to set out ultimate findings rather than evidentiary ones." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125.)

The trial court has a mandatory duty to provide a statement of decision, and commits reversible error if it fails to do so when one is properly requested. (*Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397; *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530.) When a trial court fails to provide a statement of decision

despite a proper request, appellate courts decline to reach the merits of the appellant's challenge on which the statement is relevant and customarily remand the matter to the trial court to issue a new statement. (*Karlsen*, at p. 1531; *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 165 (*Gordon*).)

This same rule applies when the trial court issues a statement of decision, but fails to make findings on a material issue. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230; *Mitidiere v. Saito* (1966) 246 Cal.App.2d 535, 539.) The amount of damages and the basis for awarding that amount are material issues the trial court must address when properly requested. (*Gordon*, *supra*, 179 Cal.App.3d at pp. 167-168; *In re Marriage of Hargrave* (1985) 163 Cal.App.3d 346, 353-354.)

Here, the Association timely requested a statement of decision on numerous issues, including the amount of damages. The proposed statement Bonito prepared did not address damages, and the Association's objections to the proposed statement noted that failure. Nonetheless, the trial court failed to mention the damages issue in its final statement of decision. Indeed, although the statement provides a comprehensive statement of the factual and legal basis for the trial court's decision finding the Association liable on the breach of fiduciary duty and negligence claims and rejecting the Association's affirmative defenses, the statement does not even state the amount of damages the trial court awarded, let alone the basis for the amount awarded. Without a statement as the basis for the trial court's award of \$1,200, we cannot reach the Association's challenge and determine whether the award was appropriate. (*Gordon*, *supra*, 179 Cal.App.4th at pp. 167-168; see *In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010 ["A statement of decision is as much, or more, for the benefit of the Court of Appeal as for the parties. It 'is our touchstone to determine whether or not the trial court's decision is supported by the facts and the law. [Citation.]'"].)

Accordingly, we reverse the trial court's judgment and remand solely for the court to issue a new statement of decision on the factual and legal basis for the award of damages.

### III

#### DISPOSITION

The judgment is reversed in part and remanded for the trial court to prepare a new statement of decision explaining the factual and legal basis for the amount of damages it awarded. The judgment is affirmed in all other respects. In the interest of justice, the parties shall bear their own costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.